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Supreme Court, U.S.
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No. 01-625

In The
SUPREME COURT OF THE UNITED STATES

CLIFFORD J. JOHNSON, Petitioner

v.

STANFORD UNIVERSITY, et al., Respondents

On Petition For Writ Of Certiorari To The
Court Of Appeal For The State Of California,
Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION

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15pp

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Abbreviations

PB = Petition For Writ Of Certiorari

BO = Brief In Opposition

1. The Two Settlement Terms Are *Not* Disputed.

At PB 5, petitioner accepts, arguendo, all findings as to the settlement terms, including that he knowingly agreed: (1) not to file prospective claims under the bounty hunter and whistleblower provisions of the FCA; and (2) not to disclose the settlement sum to the federal government, unless compelled to by legal process.

Respondents contrive to disclaim the concreteness of these fiercely fought over terms. At BO 9, 10 they add boldface and italics to the questions, thus: "***If***, to enforce a private contract, a (state) court enters an order..." They read the questions as directed not at the deterrent ruling herein, but at "such rulings...in the event that some court, some day, might issue them against someone under unknown circumstances." Their generic disclaimers are:

> [P]etitioner does *not* seek review of a dismissal by any court of any [FCA] claim... Once again, petitioner does *not* seek review of a ruling of any court which has prohibited him from communicating with a government official.

In fact, the prohibitive and deterrent operation of the settlement order is undisputed. Respondents case statement begins by announcing that petitioner seeks to "renege on a negotiated settlement of all of his claims." BO 1. That the settlement order does *not* free petitioner to file FCA claims is certified by the word "renege," which invokes the holdings at PB 16, that a litigant who files suit in breach of a settlement waiver, faces restitution and punitive fee awards.

That the settlement order prohibits voluntarily disclosing the settlement sum to federal agencies, is certified in and by the point that the government's subpoena power is a sufficient mitigation. BO 12.

2. Petitioner Remedies His Omission Of *Astra*.

Acting pro per, petitioner apologizes for having filed a substandard petition *draft*, and is grateful for its acceptance. Thereafter, the telephone and mail situation confused matters. When petitioner realized that the filing did not discuss his leading authority, *EEOC v. Astra USA, Inc.* 94 F.3d 738, 742 (1st cir. 1996), he promptly produced, served, and express-mailed a corrected petition, offering the exceptional filing, while admitting fault. Respondents then sought advice as to whether the correction had been filed, and obtained an oral decision disallowing it in advance of receipt. Respondents also obtained an extension of time, citing the added argument for cause, and specifically a new point, supported by *Astra*.[1]

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[1] These facts are documented by letters to the court dated October 23 and November 11, 2001, from petitioner, and dated November 7, 2001, from respondents, who requested an extension of time because "the 'Reasons For Granting The Writ' section has been completely rewritten, and even includes a new 'reason' not argued in the original version."

Astra is properly introduced in reply to various new points. For example, it not only rebuts the argument, at BO 12, that the government's subpoena power sufficiently mitigates the confidentiality restriction, but does so in conjunction with the narrow tailoring issue. Perhaps most importantly, it turns around respondents' lack-of-law concern and mitigates their poor-case-vehicle concerns. It is also introduced to inform the court as to the weight of respondents' grand "Conclusion," namely:

> There is no showing that California courts are in error with regard to the nonwaivability of certain federal claims or with regard to confidential settlements, nor that the California courts are in conflict with federal courts on these issues.[2]

To these ends, point 3 comprises the paragraphs that cite *Astra*, as written in the corrected petition. To the extent these paragraphs restate briefed points, they apply *Astra*, and reply to new opposition points.[3]

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[2] Petitioner of course objects to the state's order *herein*. More to the point, respondents insist that this order is correct, under state law. For example, they reaffirm its narrow tailoring standard, and agree that *Cariveau v. Halferty* 83 Cal.App.4th 128 (2000) does not apply. BO 12, 13.

[3] For example, at BO 12 respondents dismiss a legal newspaper article, which reports the key text and disposition of cited bills, as "full of hearsay and editorializing." This is replied to at 4-5 below, by its introduction as a "verifiable persuasion" re legislative facts, *of which "[t]his court could take judicial notice."*

3. Under *Astra*, The Settlement Terms Violate Public Policy, And A Miranda-Like Standard Should Apply To General Releases And Confidential Settlements.

Re analogous employer regulation, *EEOC v. Astra USA, Inc.* 94 F.3d 738, 742 (1st cir. 1996) sets controlling federal standards. At bar were settlements that *explicitly* barred communications to the EEOC, and the filing of an EEOC action -- equivalent to the explicit terms refused by petitioner. See [PB] 8. Notwithstanding the EEOC's subpoena powers, *Astra* held the non-filing agreements against public policy, *if executed without EEOC consent*, owing to the key "role that the [initial] filing of a charge plays in the statutory scheme." *Id.* 746. It also held the confidentiality agreement void, because it would frustrate the purpose of "vindicat[ing] the public interest in preventing employment discrimination." *Id.* 744. The FCA statutory scheme, and its purpose of preventing fraudulent federal claims, so apply herein.

Astra ruled out tailoring. Having explained that "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest," it affirmed an injunction against "enforcing *any* contractual provisions that impede settling employees from assisting the EEOC," and noted that this would apply to sub-covenants not to disclose settlement terms. *Id.* 744, 745 n.6; emphasis in orig.

This court could take judicial notice of the fact that this state's corporations and legislature take for granted at least the de facto legality of literally global confidentially

pacts, where people are seriously injured or killed because of product defects or environmental hazards.[4] Yet, over a year ago, *Cariveau* [*supra*] seemingly outlawed more than such worst-case confidentiality pacts. How, then, can a statute that would more narrowly declare such pacts illegal, be fiercely fought over, and lose badly? How avoid the conclusion, that public policy is trumped routinely by corporate expectations unabashed?[5]

The routine reaping of illicit benefits through generally worded adhesive waivers and nondisclosure pacts, can only be encouraged by courts that routinely welcome them to clear dockets, and restrain them only, and only maybe, in the well suppressed event of a legal contest. In *Astra*, it took EEOC pressure and an appeal to secure an injunction requiring that settling employees be informed of their agreements' legal bounds.[6] This supports petitioner's position that, to conform

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4 [*Recorder* report of foiled Senate/House Bills. PB 26 n. 13.] Petitioner in good faith quotes this legal paper as a verifiable persuasion, mindful that this is not a brief on the merits.

5 Until it discovered *Astra's* secret settlements, the EEOC found the super low employee contact rate "sinister." *Id.* 742. The paucity of secret settlement case law likewise shows only an intended effect. [*Recorder* report of secret settlement volume causing trial court herein to generally close case files.]

6 "We need not probe this point more deeply, because *Astra* now interprets the confidentiality language as inapplicable to communications between settling employees and the EEOC relevant to an ongoing investigation." *Id.* 745 n. 6. (Incidentally, this court

with public policy, waiver and confidentiality agreements *ordinarily* require a Miranda-like recitation of such inviolate rights to act in the federal interest, and to communicate concerns to federal regulators, as might otherwise be given or, more precisely, taken away.

4. The Questions Presented Are Federal

Respondents' point that this court has no jurisdiction to invalidate the state's order, because no federal question is raised, begins as follows (BO 7):

> A glance at petitioner's "Questions Presented" shows that...[t]here is no question here as to the validity of a treaty or a statute, federal or state, and no federal question is raised.

But such a glance shows that petitioner asks whether orders enforcing agreements that involve federal claims and federal agencies are against public policy, and a settlement agreement that violates federal public policy may be invalidated by a federal court, as in *U.S. ex rel. Green v. Northrop Corp.* 59 F.3d 953 (1995).

Respondents then launch into evidentiary issues as to the meaning of the settlement terms, without explaining how they can be relevant, given petitioner's acceptance of the at issue findings. Where the meaning of settlement terms is not in dispute, there is no basis for resorting to evidence. *Miller*

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could take notice of records showing that the EEOC was investigating Stanford throughout petitioner's settlement talks.)

Tabak Hirsch & Co. v. Commisioner of Internal Revnue, 101 F.3d 7, 10 (2d cir. 1996). Besides, federal law also governs evidentiary standards for deciding whether agreements waive rights under the FCA or federal constitution. This point was never mentioned by respondents or state court, though made at every stage, e.g. (opening brief on appeal 41-42):

> [*Green, supra*] not only repeats (at 960) the "well established" governance of "federal common law [] to determine the validity of a release of a statutorily-conferred federal right"; it not only (at 957) recognizes ambiguity in the general release at bar; it even (at 961), from the vast pool of state law within the Ninth Circuit's jurisdiction, picks a single case as exemplifying its disapproval of "ironclad and enforceable general releases," namely, *Winet v. Price* [4 Cal.App.4th 1159, 1166-1169 (1992),] respondents' leading light.

5. Petitioner Did Not And Could Not Waive The Confidentiality Question.

Respondents assert that petitioner "never objected in the trial court to holding certain terms confidential [or] to entry of two sealing orders." He has shown otherwise,[7] and,

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[7] See PB 7-10 (negotiations), 16-18 (opposition to judgment). Respondents obscurely echo an argument on appeal, that petitioner waived confidentiality rights by not opposing ex parte applications for the sealing orders. His reply on appeal (at 21) explained that

once again, respondents mistakenly presume petitioner's at law capacity to waive public policy objections.

6. Petitioner Did Not Contemplate Settling His FCA Claims For A Further $25,000.

Though not relevant to the issues (except in that it would, ironically, sharpen them), because it is presented as an overriding disparagement, petitioner rebuts respondents' opening story-line, namely (BO p. 1):

> This appeal arose from petitioner Clifford Johnson's anger at not being able to renege on a negotiated settlement of all of his claims against his former employer, respondent Stanford University, and then to receive an additional $25,000 to settle his federal claims.

At BO 4, Respondents state that petitioner had hoped "to release those same FCA claims for $25,000, as set forth above." Set forth above was an excerpt from an "amazing declaration" of petitioner (ellipses and parentheses in orig.):

> ...[G]iven that I was seeking only a further $25,000 monetary satisfaction, I hoped that I need do no more than draft a federal claims complaint, using my already drawn allegations of multi-million dollar federal claims act violations.

"the notice of the first motion for a sealing order was served a day after it had been granted, and no notice issued re the second."

But the preceding sentence was logically linked to the above:

> I would rather not have to initiate a second federal claims action to recover the additional satisfactions that I had decided to insist on, in exchange for a gentlemen's agreement not to so proceed. However, given...

The words "further" and "monetary" thus *added* the $25,000 sum to the *sine qua non*, non-monetary demands of the "gentlemen's agreement" at PB 9, for an admission of error and removal of the rehire bar.

The Appendix presents petitioner's trial court explanation of the $25,000 sum.

7. The FCA Waiver Question Is Ripe.

At PB 26, Petitioner cites coherent, but dichotomous and self-doubting, FCA waivability decisions, pointing out that this case offers a ripe opportunity to definitively draw the waivability line, *if there is one*, between bounty hunter and whistleblower suits. Respondents claim that *Nguyen v. City of Cleveland* 121 F.Supp.2d 643 (N.D. Ohio 2000) says "nothing whatsoever about whether [whistleblower] claims are waivable." BO 15. *Nguyen's* holding, that state courts have *full* jurisdiction to decide such claims, would seem to include waivers. If not, for this particular holding, see *U.S. ex rel. Summit v. Michael Baker Corp.* 40 F.Supp.2d 772 (E.D.Va. 1999).

8. Re Confidentiality, The Lack Of Law Reflects Suppressive Mechanics That Enhance The Issue.

The above discussion of *Astra* reveals the mechanics that effectively frustrate the development of secret settlement case law. Its 1995 injunction, requiring that employee settlors be told they could talk to the EEOC, had no effect on respondents' settlement practices, in 1998.

The lack of effective law equates to the unchecked imposition of literally global confidentiality on injured lay parties. The need for a national standard seems plain, and, in light of public purse and safety implications, why brook further delay?

CONCLUSION

For the foregoing reasons, respondents' opposition serves only to underscore the reasons for granting the writ.

Respectfully submitted,

_____ Date _____

Clifford Johnson, Petitioner pro se.

APPENDIX: RECORD RE $25,000

Excerpt Of Memorandum Of Points And Authorities In Opposition To The Motion To Enforce The Purported Settlement (p. 4) filed March 19, 1999.

As recounted at PD[Plaintiff's Declaration] ¶ 6, at about the end of November, Plaintiff suffered additional damages so substantial and so gratuitously imposed by Defendant that he decided that he absolutely could not let them pass. They arose from the surprising service of a burdensome and defamatory subpoena on Plaintiff's employer for the previous five years. From the day of commencement of this employment, Plaintiff had expressly and emphatically terminated all his employment-related damages. A snapshot of the unfortunate affair is provided by the resume given under point C in Plaintiff's November 13 letter to Defendant, shown at PD Ex.2.[8] The egregious indifference of

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[8] Plaintiff wrote (emphasis in original):

> The subpoena raises the specter of potentially drastic further damages, by gravely interfering in an employment relationship built by Plaintiff over five years. Issued unilaterally, *for thin and disputed cause, and with a determination as to its allowability imminent*, it manifestly risks potentially drastic damage to Plaintiff, for vacated cause. What cause could be thinner than a need to disprove emotional damages the existence of which the Plaintiff has emphatically denied? What out-of-the-blue discovery could be more vicious to a wrongfully terminated adversary who has

Defendant's counsel caused Plaintiff to resolve to seek additional compensation. For example: Defendant served the subpoena in violation of a stipulation it had drafted, in which the parties promised to put off depositions until the conclusion of the settlement negotiations; Defendant not only opposed Plaintiff's ex parte application for a short stay to accomplish this, but sought sanctions, characterizing the application as a "frivolous, dishonest stunt"; Defendant asserts in this proceeding (DM[Defendants' Memorandum] 1) that Plaintiff is "obviously sorry to have relinquished his primary source of entertainment in life"; and Defendant dismisses the additional sum sought as a baseless attempt "to hit Stanford up for more money" (DM at 8). Defendant's blindness to the fact that it had gratuitously imposed a real and extreme form of damage escalation naturally resolved Plaintiff to insist on an additional $25,000 at the December 11, 1998 settlement conference. He elected to package this additional demand with his standing offer to settle his prospective federal claims, so as to let stand the settlement terms reached in the September mediation, all else being a pool of considerations additional thereto.

[Petitioner was laid off in July, 1999, in the course of a reorganization, for legally sufficient cause.]

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successfully curtailed his damages, or risk more cost to the client on whose behalf it is conducted? For further details, see PD ¶ 6.